



June 18, 2012

The Honourable Peter Mackay
Minister of National Defence
National Defence Headquarters
Major-General Georges R. Pearkes Building
Ottawa, Ontario K1A 0K2

Minister MacKay:

Re: MPCC-2011-004 (Fynes)
Solicitor-Client Privilege Claims

As you are aware the Military Police Complaints Commission is conducting a Public Interest Hearing into complaints regarding the conduct of CFNIS members in connection with matters related to the death by suicide of Cpl Stuart Langridge and its aftermath, including three related CFNIS investigations into these matters.

The allegations before the Commission pertain to the fundamental issues of CFNIS independence and impartiality, including alleged failures to investigate, and alleged lack of professionalism and competence.

These are serious allegations and deserve to be dealt with in a manner that fosters public confidence in the independent public oversight provided by the MPCC and thereby, ultimately, in the Military Police themselves.

I believe that you may have been briefed about some of the issues arising from limitations on documents and testimony available to the Commission by virtue of claims of solicitor/client privilege that have been made on your behalf by the counsel team acting for various Government of Canada interests.

These claims have led to considerable debate and to no small level of frustration.

Much of the discussion surrounding these issues at the Hearing has focussed on the legal framework for solicitor/client privilege and its implications for the jurisdiction of the Commission to receive and accept certain documentary and testimonial evidence. While these are important questions and counsel on all sides of the issue have set out their legal positions forcefully and with undoubted integrity, it is also clear to me that this approach to the issue will surely lead to protracted adversarial proceedings through multiple layers of the court system. Whatever else such an approach may lead to, it would as a practical consequence surely lead to enormous expense and significant delay.

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It would also be totally out of keeping with the spirit of Public Interest Hearings as envisaged by the *National Defence Act*, which are meant to be investigative rather than adversarial proceedings and are designed to shed light on the facts relevant to the resolution of complaints rather than to be sidetracked by bickering over abstract principles.

In that regard, I was greatly heartened by your recent public reiteration of the Government's commitment to full cooperation with the Commission.

Regardless of the position that may be taken regarding the nature and extent of the legal implications of solicitor/client privilege, I believe there is no question that the law, including the applicable Supreme Court of Canada jurisprudence,¹ authorizes you, as the holder of that privilege on behalf of Government, to waive the privilege either on a blanket basis or with respect to specifically identified communications.

There also appears to be no question that a claim of privilege with respect to specific communications can be waived without prejudice to the Government's legal position that absent such waiver, the privilege would properly apply. It is also my understanding that there is nothing in the report recently produced by the Honourable Justice Lesage that restricts or contradicts your power as the Minister to waive privilege.

Given that counsel on behalf of Government has repeatedly stated that with respect to any communications that may fall within the ambit of solicitor/client privilege, her hands are tied by the current state of the law, it is my request that as a pragmatic solution to the present impasse, you agree to untie counsel's hands by waiving privilege.

The waiver being requested is not a global or blanket waiver but rather a limited waiver restricted to specific communications that lie at the heart of the subject matter that the current Public Interest Hearing is meant to investigate and that implicate the Commission's ability to discharge its independent oversight mandate.

The information in question was available to the Military Police members involved in the conduct of the investigations at issue and either formed part of the issues they had to investigate or, in whole or in part, formed the basis for decisions made about the conduct of those investigations. For this reason, obtaining the information in question is, in my view, central to the Commission's ability in the present case to discharge the duties mandated by Parliament.

I therefore request that, given the unique circumstances of this case, you exercise your discretion to waive any solicitor/client privilege for the purposes of this Hearing with respect to the specific matters listed below. This would allow redactions that currently black out relevant information to be lifted and questions currently being objected to, to be answered.

¹ See *Canada (Privacy Commissioner v. Blood Tribe Department of Health*, 2008 SCC 44.

The specific information is as follows:

- The legal considerations underlying decisions made by the Canadian Forces regarding whether to conduct a suicide watch over Cpl Langridge in the period following his discharge from Alberta Hospital at Edmonton on 5 March 2008, as well as the legal considerations underlying the Canadian Forces' understanding of their powers with respect to and the conditions imposed on him by his Regiment in that period. These issues were before the initial Sudden Death investigation that followed Cpl Langridge's suicide and form part of the subject matter that the complainants specifically requested be investigated in the CFNIS 2010 investigation.
- The identity of the decision-maker responsible for the designation of Cpl Langridge's next of kin ("NOK"), as well as the identity of the decision-maker responsible for determinations regarding the validity of Cpl Langridge's will and the designation of the executor of his estate, as well as in both cases the basis for these decisions. These matters lie at the very core of the 2009 investigation conducted by the CFNIS and are crucial for an assessment of the complaints regarding that investigation. In order to come to informed conclusions about these matters, an appreciation of how the Canadian Forces understood and applied the law relating to post-death administration, including the law of estates, within the Canadian Forces is required. A failure to disclose this information would be especially unfortunate because it might appear to stand for the proposition that the Canadian Forces are entitled to administer military estates on the basis of an interpretation of the law that they are not required – or even permitted – to disclose to the public.² As indicated by Commission counsel during the Hearing, this is a view that might plausibly be understood as a claim to be entitled to administer "secret law".
- The legal reasoning for the decisions made by CFNIS members about the conduct of the 2009 and 2010 investigations, to the extent they were based on advice received directly by the CFNIS members involved. This information is vital for an assessment of the 2009 and 2010 CFNIS investigations.

Of course, if there is any information covered by a claim of solicitor/client privilege that would be helpful for the subjects of the complaint to explain their actions, a waiver should be considered for that information as well.

It is my belief that the information being requested is of sufficient importance to the Public Interest Hearing, that making it available to the Commission could be seen as an aspect of the "full cooperation" promised by the CFNIS and the Canadian Forces with the work of the Commission.

² In this regard, questions objected to included: Is the identity of the next-of-kin determined on the basis of a legal rule or statute or by appointment? Does the military have any preliminary role in determining the validity of a will? Does the military have any power or capacity to determine who the executor of a given will might be? Are there any legal implications to the use of the qualifier "primary" or "secondary" to modify the term "next-of-kin"? If there is more than one Personal Emergency Notification form, is there a rule as to which takes precedence? Who has ownership of the funeral as between the military and the grieving family? (*Transcript of Proceedings*, Fynes Public Interest Hearing, Vol 25, May 22, 2012, at p. 75, 81, 84, 86 & 87).

It is my hope that a specific waiver on your part of any solicitor/client privilege that may attach to these matters will be forthcoming. This common sense approach would allow the Public Interest Hearing to address the complaints in a forthright and comprehensive fashion.

Please note that in keeping with the Commission's practice in Public Interest Hearings, the present correspondence will be provided to the Parties and will be made available to the public.

Please do not hesitate to contact the Commission if you wish to obtain additional information about these proceedings.

Yours truly,

A handwritten signature in blue ink, appearing to read "Glenn Stannard", with a stylized flourish at the end.

Glenn M. Stannard, O.O.M.
Chair